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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

STATE OF WASHINGTON,

Plaintiff,

v.

BETSY DeVOS, in her official capacity as Secretary of the United States Department of Education, and the UNITED STATES DEPARTMENT OF EDUCATION, a federal agency,

Defendants.

NO. 2:20-cv-00182-TOR

PLAINTIFF STATE OF WASHINGTON'S MOTION FOR PRELIMINARY INJUNCTION

NOTED FOR: JUNE 11, 2020
With Oral Argument at time and location to be determined by Court

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I. INTRODUCTION

The Court should enter a preliminary injunction to prevent the United States Department of Education (the Department) from arbitrarily denying emergency grants to more than 50,000 of Washington's most vulnerable college students struggling to cope with the COVID-19 pandemic. In late March, Congress urgently appropriated over $6 billion and directed the Secretary of Education to distribute it according to a prescribed formula to colleges and universities for emergency grants to students reeling from the disruption of campus operations. The Department initially complied with Congress's command, but within just 11 days reversed itself and unilaterally limited eligibility to only those students who met the financial aid eligibility criteria under an entirely different statute.

Washington is likely to succeed on the merits. The operative statutory provision, a section of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), delegated no rulemaking authority to the Department. Further, the Department's interpretation warrants no deference even under the limited *Skidmore* test. Without any statutory or rulemaking authority, the Department engrafted eligibility requirements from a separate, unrelated statute, the Higher Education Act (HEA). The Department exemplified inconsistency: At the same time it advised that CARES Act emergency grants are not financial aid, it inexplicably adopted the eligibility criteria for federal financial aid as a basis for

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limiting which students might be eligible to receive those grants. Further, without any explanation for reversing course after just 11 days, the Department seemingly picked out at random just one of a myriad financial aid eligibility standards contained in the HEA. The Department's action bears all the hallmarks of arbitrary and capricious decision-making, exceeded its statutory authority, and violated separation of powers principles and the Spending Clause in the United States Constitution. All this violates the Administrative Procedure Act and necessitates setting aside the Department's action.

Washington is likely to suffer irreparable harm. The Department's interpretation forces Washington schools to exclude some of their students with the greatest needs, who do not meet the eligibility requirements for federal financial aid. It denies financial assistance to these vulnerable students during an unprecedented time, forcing them to abandon their higher education and forego food, health care, and mental health counseling previously offered on Washington campuses. These are *emergency* funds appropriated by Congress to respond swiftly to a public health crisis; Washington schools and students cannot wait until final resolution of this action on the merits.

The Court should grant Washington's motion for preliminary injunction.

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II. STATUTORY AND FACTUAL BACKGROUND

A. COVID-19

On February 29, 2020, Washington State made the first announcement of a death from COVID-19 in the United States. On the same day, Washington Governor Jay Inslee declared a state of emergency in all counties in Washington. Beyond the one reported death, the Governor's Proclamation stated that, at the time, there were 66 confirmed cases of COVID-19 in the United States.[1] In the 80 days since Governor Inslee declared a state of emergency, the country has gone from 66 to 1,520,029 reported cases and from 1 to 91,187 deaths.[2] Washington now reports 18,611 cases and 1,002 deaths.[3]

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[1] State of Washington Office of the Governor, Proclamation by the Governor 20-05, https://www.Governor.wa.gov/sites/default/files/proclamations/20-05%20Coronavirus%20%28final%29.pdf (last visited May 14, 2020).

[2] Johns Hopkins University & Medicine, COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU), https://coronavirus.jhu.edu/map.html (last visited May 19, 2020).

[3] Washington State Department of Health, COVID-19 Data Dashboard, https://www.doh.wa.gov/Emergencies/NovelCoronavirusOutbreak2020COVID19/DataDashboard (last visited May 19, 2020).

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B. The Coronavirus Aid, Relief, and Economic Security Act

On March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). The CARES Act appropriated $30.75 billion to the Department of Education "to prevent, prepare for, and respond to coronavirus[.]" *Id*., Preamble to § 18001.

The CARES Act appropriated approximately $14 billion for the Higher Education Emergency Relief Fund (HEERF). CARES Act § 18001(b). In section 18004, the section at issue in this litigation, Congress explained its intent as to the HEERF. First, it commanded the Secretary of Education to distribute the HEERF to institutions of higher education. CARES Act § 18004(a). Second, it specified exactly how the Secretary is to allocate the money, prescribing a formula based on student enrollment. *Id*. § 18004(a)(1). Third, it provided explicit instructions on the means of distribution, dictating that the Secretary employ the Department's existing grants management system used to distribute federal student aid funds. CARES Act § 18004(b). Fourth, it specified how HEERF funds may be used, providing, as relevant to this litigation:

> Institutions of higher education shall use no less than 50 percent of such funds to provide emergency financial aid grants to students for expenses related to the disruption of campus operations due to coronavirus (including eligible expenses under a student's cost of attendance, such as food, housing, course materials, technology, health care, and child care).

CARES Act § 18004(c).

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Section 18004 did not grant the Secretary any rulemaking or interpretive authority, nor any discretion in implementing Congress's directives. Indeed, subsection (c), the use provision, did not mention the Secretary at all.

C. The Department's CARES Act Guidance

1. The Department initially complied with Congress's directive

The Department initially followed Congress's instructions. On April 9, 2020, it released the portion of the CARES Act funding Congress appropriated for student emergency grants. In addition to a press release, the Department contemporaneously issued a letter from Secretary DeVos to college and university presidents, a certification form for higher education institutions, and a list of individual allocations to colleges and universities. Simpson Decl., Exs. A-D.[4]

The Department's April 9, 2020, issuances correctly read the CARES Act as giving no authority to the Department to restrict the students to whom institutions awarded emergency grants, and as empowering institutions to determine the recipients limited only by the express requirements in the Act.

In the April 9, 2020, letter to college and university presidents, Secretary DeVos wrote that "[t]he CARES Act provides institutions with

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[4] Declarations in support of Washington's motion for preliminary injunction are cited throughout by the declarant's last name, followed where appropriate by the pertinent numbered exhibit, designated by "Ex."

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significant discretion on how to award this emergency assistance to students." Simpson Decl., Ex. B. This "means that each institution may develop its own system and process for determining how to allocate these funds[.]" *Id*. She stated that "[t]he ***only*** statutory requirement is that the funds be used to cover expenses related to the disruption of campus operations due to coronavirus (including eligible expenses under a student's cost of attendance, such as food, housing, course materials, technology, health care, and child care)." *Id*. (emphasis added).

The Department's press release confirmed that once institutions submitted the required certification, "[t]he college or university will then determine which students will receive the cash grants." Simpson Decl., Ex. A. The certification form also acknowledged that institutions "retain[] discretion to determine the amount of each individual emergency financial aid grant consistent with all applicable laws including non-discrimination laws." Simpson Decl., Ex. C. The language in the certification regarding institutions' use of CARES Act emergency grant funding was intentionally hortatory and not mandatory, using phrases such as "the Secretary recommends," "the Recipient should be mindful," and the "Secretary strongly encourages." *Id*.

The certification form expressly disavowed that CARES Act emergency grants were subject to the requirements of Title IV of the Higher Education Act (HEA): "The Secretary does not consider these individual emergency financial aid grants to constitute Federal financial aid under Title IV of the HEA." *Id*. This

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was consistent with public guidance the Department's Office of Postsecondary Education issued on April 3, 2020, which stated that emergency federal financial aid grants are "not counted . . . as estimated financial assistance for packaging purposes." Simpson Decl., Ex. E. Higher education news sources noted institutions' broad discretion recognized by the Department, reporting that the Title IV federal financial aid eligibility requirements did not apply: "Notably, neither the statute or certification form require that these funds be provided to Title IV eligible students, meaning schools are able to cast a wider net in determining and meeting emergency needs." Simpson Decl., Ex. F.

Washington higher education institutions, acting urgently on Congress's offer of federal aid to their students, promptly submitted applications and signed certifications according to the Department's then-existing instructions and assurances. Woods Decl. ¶ 12 (applied April 10, 2020); Flores Decl. ¶ 12 (applied April 12, 2020); Allison Decl. ¶ 12 (applied April 13, 2020); Buchmann Decl. ¶¶ 12-13 (applied April 21, 2020); Soto Decl. ¶ 12 (applied April 21, 2020); Allison Decl. ¶ 12 (applied April 13, 2020); Sanchez Decl. ¶ 12 (applied April 10, 2020).

2. The Department's about-face

Nevertheless, 11 days later the Department reversed course. On April 21, 2020, in connection with its release of different CARES Act funding, the Department issued "FAQs" that purported to restrict student eligibility for

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emergency grants. The Department asserted that "[o]nly students who are or could be eligible to participate in programs under Section 484 in Title IV of the Higher Education Act of 1965, as amended (HEA), may receive emergency financial aid grants." Simpson Decl., Ex. G, FAQ #9; *see also id*., Ex. H, FAQ #5 (the "Eligibility Restriction"). Despite Congress having assigned the Department no role in determining institutions' use of emergency grant funds, the Department engrafted its own eligibility restriction onto those grant funds from a different statute, unlawfully adding that onto "[t]he only statutory requirement" it previously had identified, Simpson Decl., Ex. B, and restricted institutions' discretion.

The Department's unilateral Eligibility Restriction excluded hundreds of thousands of students in desperate need of financial assistance nationwide. The HEA contains numerous requirements for student eligibility for financial aid not found in the CARES Act. These include U.S. citizenship or legal permanent resident status; a valid Social Security number; registration with Selective Service (if the student is male); a high school diploma, GED, or completion of high school in an approved homeschool setting; that the student not be in default on any loan issued by the Department; and maintenance of at least a cumulative C average, or its equivalent or academic standing consistent with the requirements for graduation. 20 U.S.C. §§ 1091(a)(3), (c)(1)(B) (2020); *see also* 34 C.F.R. §§ 668.32, 668.34(a)(4)(ii) (2020); Yoshiwara Decl. ¶ 11.

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While technically a student does not need to possess a Department-approved federal student aid application (called a Free Application for Federal Student Aid, or FAFSA), most schools do "not have the capability to determine if students are eligible for federal financial aid under Title IV without information provided by [the Department], such as an approved FAFSA." Flores Decl. ¶ 10; *see also* Yoshiwara Decl. ¶ 21. Furthermore, "given the number of these students and the urgent need for us to distribute the emergency grants," those schools "do not have the capacity to research and independently determine if these students would qualify for federal financial aid under Title IV." Flores Decl. ¶ 18.

Institutions' compliance with the Eligibility Restriction is mandatory. The Department's required certifications made institutions that received HEERF money liable for any failure to comply with the CARES Act—threatening treble damages under the False Claims Act, 31 U.S.C. § 3729(a)(1), if they did not abide by the Eligibility Restriction. Simpson Decl., Exs. C ¶ 4(g), I ¶ 4(i); *see also* Flores Decl. ¶ 11; Woods Decl. ¶ 11; Buchmann Decl. ¶ 11; Allison Decl. ¶ 11; Sanchez Decl. ¶ 11.

The Department's Eligibility Restriction immediately cut off access to emergency grants to tens of thousands of Washington students and denied institutions discretion granted by Congress in using HEERF funds. This litigation ensued.

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D. Injury to Washington Institutions and Their Students

1. Institutional injuries

The Department's Eligibility Restriction applies directly to Washington colleges and universities and limits their ability to distribute CARES Act funds to all needy students. As a result, students have been saddled with a variety of expenses because of the disruption of campus operations. These include scouring alternatives for lost campus jobs, shuttered school health clinics, and closed onsite mental health counseling; homeless students' need to find hygiene facilities to replace campus shower facilities; disabled students' needs to buy technology resources that accommodated their disability such as screen readers, alternate format textbooks, and notetakers; and replacing campus technical equipment such as computers, printers, cameras, and upgrades of internet services or internet hotspots. Flores Decl. ¶ 15; Woods Decl. ¶ 17; Soto Decl. ¶ 16; Yoshiwara Decl. ¶ 18; Sanchez Decl. ¶ 17; Allison Decl. ¶ 16; Cleary Decl. ¶ 13.

In addition, by denying students needed emergency funds, the Eligibility Restriction has forced students to disenroll as they "struggle with the financial fallout of COVID-19." Flores Decl. ¶ 21; Yoshiwara Decl. ¶ 24; Woods Decl. ¶ 23; Sanchez Decl. ¶ 25; Allison Decl. ¶ 23. This has reduced tuition payments and exacerbating educational institutions' financial strain caused by the pandemic. Flores Decl. ¶¶ 21-22, 25; Woods Decl. ¶ 23; Buchmann Decl. ¶¶ 21-29; Yoshiwara Decl. ¶¶ 23-25; Allison Decl. ¶ 22; Sanchez Decl. ¶ 25.

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At the same time, the Eligibility Restriction has undermined the critical mission of Washington higher education institutions. As envisioned by the Washington legislature, this is to "[o]ffer an open door to every citizen, regardless of his or her academic background or experience, at a cost normally within his or her economic means" to "basic skills and literacy education, and occupational education and technical training in order to prepare students for careers in a competitive workforce," Wash. Rev. Code §§ 28B.50.020(1), (3), and to "higher education institutions . . . [offering] . . . educational opportunities . . . essential to the economic, intellectual, and social well-being of the state and its people." Wash. Rev. Code § 28B.07.010 (2019). As one community college vice president put it:

> Wenatchee Valley College enriches North Central Washington by serving educational and cultural needs of communities and residents throughout the service area (Chelan, Douglas, and Okanogan counties). . . . It is identified as a Hispanic Serving Institution. . . . [T]he loss of enrollment because of the new restrictions imposed by ED's FAQs will cause students to give up or put on hold their hopes of bettering their lives, which is the ultimate goal of our institution.

Flores Decl. ¶ 25; *see also* Woods Decl. ¶ 27; Buchmann Decl. ¶ 30; Soto Decl. ¶ 22; Allison Decl. ¶ 27; Sanchez Decl. ¶ 30; Cleary Decl. ¶ 20.

2. Student injuries

The Eligibility Restriction has also gravely harmed Washington students. It forced institutions to deny emergency grants to students in Basic Education for Adults programs, a population more likely to rely on campus internet or computer

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labs, making the transition to distance learning more challenging or impossible without financial support. Flores Decl. ¶ 16; Woods Decl. ¶ 18; Allison Decl. ¶ 17; Buchmann Decl. ¶ 16. The Washington Board of Community and Technical Colleges reports 24,364 basic adult education students disqualified from CARES Act emergency grants by the Eligibility Restriction. Yoshiwara Decl. ¶ 17.

Institutions must also exclude students in the Running Start Program, who are 11th and 12th grade students taking college courses at Washington's 34 community and technical colleges, earning both high school and college credits for their courses. *See* Coronavirus (COVID-19) Information, Running Start, https://www.sbctc.edu/colleges-staff/programs-services/running-start/default.aspx (last visited May 16, 2020). Flores Decl. ¶ 12; Woods Decl. ¶ 19; Buchmann Decl. ¶ 17; Allison Decl. ¶ 18; Sanchez Decl. ¶ 18. Many of these students qualify for free or reduced lunches and now face food insecurity due to campus closure. Yoshiwara Decl. ¶ 20. In the 2017-18 school year, 28,451 high school-aged students enrolled in Running Start. Yoshiwara Decl. ¶ 14.

The Eligibility Restriction excludes many students under the age of 24 who would otherwise qualify for aid under Title IV but have not filed a FAFSA. Flores Decl. ¶ 18; Woods Decl. ¶ 20; Allison Decl. ¶ 19; Buchmann Decl. ¶ 18; Sanchez Decl. ¶ 18. Institutions' need to rely on Department-approved FAFSAs particularly harms students in Washington because Washington ranks 49th of the 50 states in high school students' FAFSA completion rate. Yoshiwara Decl. ¶ 13.

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Wenatchee Valley College, for example, has a FAFSA filing rate of 56%. Flores Decl. ¶ 9. Columbia Basin College has a FAFSA filing rate of just 41%. Woods Decl. ¶ 9. Skagit Valley College has a FAFSA filing rate between 38% and 48% annually. Allison Decl. ¶ 9. For North Seattle College, 5,825 of the school's 6,073 students have not filled out a FAFSA application for this year. Sanchez Decl. ¶ 9. Students do not file FAFSAs for various reasons. As one college vice president explained, "many of our students did not complete high school and are seeking to reengage in school, others are high school Running Start Students, others do not want to take out loans but are just above the threshold to become eligible for a Pell Grant, others would otherwise be eligible except they are under 24 and their parents refuse to sign the FAFSA." Flores Decl. ¶ 9. According to the Washington Student Achievement Council, approximately 40,000 high school graduates (using 2020 figures) did not submit a FAFSA (including 7,127 students at Washington State University alone. Dixon Decl. ¶ 9). Yoshiwara Decl. ¶ 13.

In addition, Washington colleges and universities have many students who have temporary protected status or participate in DACA.[5] Flores Decl. ¶ 19;

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[5] Washington is home to approximately 17,000 "Dreamers," who are individuals brought to the country at an early age, educated by Washington secondary schools, and protected under the Deferred Action for Childhood Arrivals program. *See* Memorandum from Janet Napolitano, Secretary of Homeland Security, U.S. Dep't of Homeland Security, Exercising Prosecutorial

Woods Decl. ¶ 21; Soto Decl. ¶¶ 18-19; Buchmann Decl. ¶ 19; Allison Decl. ¶ 19; Sanchez Decl. ¶ 22; Cleary Decl. ¶ 14. Under the Department's Eligibility Restriction, these students are ineligible to receive emergency financial aid under the CARES Act. "If these students do not receive this aid and no other assistance is available, many will have to disenroll, lose housing, or face any number of consequences of lack of funds." Flores Decl. ¶ 19.

III. ARGUMENT

A. Legal Standard

"A party can obtain a preliminary injunction by showing that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in [its] favor, and (4) an injunction is in the public interest." *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (internal quotation marks and citations omitted); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Under the Ninth Circuit's "sliding scale" approach, these elements are "balanced, so that a stronger showing of one element may offset a weaker showing of

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Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-USasChildrenProsDis.pdf (last visited May 18, 2020).

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another." *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (internal quotation marks and citations omitted).

B. Washington is Likely to Succeed on the Merits of Its Claims

The Department's Eligibility Restriction is a binding requirement imposed on institutions of higher education. This constitutes "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court . . . ." 5 U.S.C. § 704 (2020). The Administrative Procedure Act (APA) requires that a court "hold unlawful and set aside agency action, findings, and conclusions found to be" (1) in excess of statutory authority, (2) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or (3) "contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. §§ 706(2)(A), (B), (C) (2020). Here, the Department's Eligibility Restriction was adopted in excess of their delegated authority, is arbitrary and capricious, and in violation of the constitution.

1. The Department's Eligibility Restriction exceeds its statutory authority

An agency "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986). And here the Department has not been conferred any authority—explicit or implicit—to impose restrictions on which students may and may not have access to vital emergency funds appropriated by Congress to assist higher education students.

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a. Congress did not delegate authority to the Department to make eligibility rules for student emergency grants

(1) The plain language of section 18004 forecloses any rulemaking authority

The Department's Eligibility Restriction improperly imports the eligibility requirements for federal financial aid from Title IV, section 484 of the Higher Education Act into the CARES Act and thus interprets "students" as only those who are eligible for federal financial aid. Section 18004, however, provides no support for this interpretation.

"The starting point for this inquiry is, of course, the language" of the statutory provision at issue. *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). The language of section 18004 lacks *any* delegation of rulemaking authority to the Secretary. As in *Gonzalez*, the CARES Act "does not grant" the Department "broad authority to promulgate rules." *Id*. at 259. Nor can "the . . . limited powers [granted to the Department], to be exercised in specific ways," support the Department's interpretation. *Id*. The CARES Act gives the Department specific direction for the amounts and the means to distribute the HEERF. This narrow authority does not suggest any rulemaking power.

The absence of rulemaking authority in section 18004 is in sharp contrast to other portions of the Act that do delegate rulemaking authority to agencies. For example, in an earlier section—specifically addressing relief for student loan borrowers—the Secretary is delegated authority to "waive the application of . . . negotiated rulemaking" under the HEA. CARES Act § 3513(f). Moreover, the

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Director of the Bureau of Prisons is directed to engage in rulemaking to provide prisoners with video visitation and is exempted from the notice and comment period of 5 U.S.C. § 533. *Id*. § 12003(c). And, the Small Business Administration has been delegated an "emergency rulemaking authority." *Id*. § 1114.

But what is lacking is any reference to rulemaking to interpret section 18004. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). The CARES Act is clear: Congress did not intend to delegate rulemaking authority to the Department to interpret section 18004.

(2) The Secretary has no implicit rulemaking authority

Courts have been skeptical of claims of implicit authority—or the claim that interpretive authority exists over one area due to authority granted in another. In *Gonzales v. Oregon*, 546 U.S. 243 (2006), the Court held the Attorney General lacked authority to interpret the meaning of the law, even when delegated the authority to ensure compliance with the law. *Id*. at 263-64. In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Court rejected the claim that EEOC or any other agency had authority to define "disability" under the ADA when the delegating provision instructing the EEOC to "issue regulations . . . to carry out this subchapter" was in a separate subchapter from the definition. *Id*. at 478. In

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Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638 (1990), the Court held that a delegation of authority to promulgate motor vehicle safety "standards" did not include the authority to decide the pre-emptive scope of the federal statute when the statute lacked a specific delegation regarding enforcement provisions. *Id*. at 649-50.

The Ninth Circuit recently addressed an executive agency imposing conditions on grants without specific authority to do so, as the Department attempts here. In *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019), the Assistant Attorney General (AAG) imposed immigration related conditions on Byrne JAG grants. Similar to the CARES Act grants, Byrne JAG grants are "formula grants," meaning "Congress appropriates a set amount of funding and specifies how the funds will be allocated among the eligible recipients, as well as the method by which an applicant must demonstrate its eligibility for that funding." *Id*. at 935 (internal quotation marks omitted). Although Congress delegated authority to the AAG to "plac[e] special conditions on all grants, and determin[e] priority purposes for formula grants," the Court held that this did not grant "broad authority to impose any condition it chooses on a Byrne JAG award." *Id*. at 939, 942 (citing *City of Philadelphia v. Attorney Gen. of U.S.*, 916 F.3d 276, 288 (3d Cir. 2019)); *see also City of Chicago v. Barr*, Nos. 18-2885 & 19-3290, 2020 WL 2078395, at *8–9 (7th Cir. Apr. 30, 2020) ("[i]t would strain statutory interpretation to the breaking point to interpret a provision that requires

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the fostering of communication as handing to the Assistant Attorney General the power to withhold the entire Byrne JAG award for the failure to comply with substantive conditions imposed by the Attorney General"); *Oregon v. Trump*, 406 F. Supp. 3d 940, 969–70 (D. Or. 2019) (statute invoked by federal government—"an otherwise unremarkable provision nested within a larger list of mundane responsibilities—would again be an odd location for Congress to house such an authority"). Instead, the Court held, that "[s]uch a broad interpretation would be antithetical to the concept of a formula grant[.]" *Barr*, 941 F.3d at 942.

Even more so here, where Congress did not authorize the Department even to impose conditions on or determine purposes of grants. Section 18004 directed the Secretary to make the funds available and to use the same "system" it normally uses to distribute grant money. But it does not delegate any rulemaking authority to the Department or any authority to otherwise interpret other portions of the Act.

(3) The Department lacks authority to interpret section 18004 because it is an appropriations statute

A third reason the Department's interpretation is unsupportable is that agencies generally lack authority to interpret appropriations statutes. Therefore, courts owe no deference to agency interpretations of appropriations statutes or riders. *See U.S. Dep't of the Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1348 (D.C. Cir. 2012); *Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 370 F.3d 1214, 1221 (D.C. Cir. 2004). Similarly, the Department's

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interpretation of the CARES Act receives no deference as a statute generally applicable to all federal agencies. *DLS Precision Fab LLC v. U.S. Immigration & Customs Enf't*, 867 F.3d 1079, 1087 (9th Cir. 2017).

An appropriations law is a "statute, under the jurisdiction of the House and Senate Committees on Appropriations, that generally provides legal authority for federal agencies to incur obligations and to make payments out of the Treasury for specified purposes." United States Government Accountability Office, A Glossary of Terms Used in the Federal Budget Process, No. GAO-05-734SP at 13 (September 2005), https://www.gao.gov/new.items/d05734sp.pdf (last visited May 18, 2020); *see Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (an appropriations act "defines the scope of a federal spending program").

A review of the statutory sections creating and implementing the HEERF makes clear they are appropriations provisions. The preamble to section 18001 makes an appropriation of $30.75 billion to the Department, and sections 18001-18007 prescribe the specific purposes for which the funds may be spent. Section 18004 defines the scope of the HEERF spending program, the Department lacks authority to interpret it, and its interpretation is not entitled to deference.

b. The Department's Eligibility Restriction fails to persuade under *Skidmore*

The basis of *Chevron* deference is that "Congress has delegated authority to an administrative agency to make rules carrying the force of law and that

agency's interpretation to which deference is to be given was promulgated in the exercise of that authority." *Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158, 168 (2d Cir. 2017). When Congress has not delegated interpretive authority and yet an agency takes it upon itself to exercise that authority, the agency's action is not entitled to *Chevron* deference. *Gonzales*, 546 U.S. at 258; *Sierra Club v. Trump*, 929 F.3d 670, 692 (9th Cir. 2019). Here, the proper standard of review is prescribed by *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), under which an agency's interpretation is only given deference to the extent it has the "power to persuade." *Skidmore* deference depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements" as well as its overall "power to persuade[.]" *Skidmore*, 323 U.S. at 140.

Skidmore's criteria undercut the Eligibility Restriction. The Department's actions manifest telltale inconsistency. It initially stated that institutions would have "significant discretion" in how to award the funds and "the *only statutory requirement* is that the funds be used to cover expenses related to the disruption of campus operations due to coronavirus," and its own Certification form specifically stated that the grants do not "constitute Federal financial aid under Title IV of the HEA." Simpson Decl., Ex. B (emphasis added). Yet just 11 days later the Department reversed course and determined the emergency funds *are*

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federal financial aid and students would have to qualify under Title IV of the HEA. *Id*., Ex. G.

Further, it did so in so-called "FAQs," which contained no analysis or explanation for the change. The Department failed to explain where or how Congress expressed its intent to apply Title IV to CARES Act emergency grants—particularly when federal financial aid is addressed in a separate section of the Act. *Compare* CARES Act § 3513 (addressing federal financial aid) *with* section 18004 (addressing relief for higher education institutions and students). Nor was the certification updated to remove the language that grants were not considered Title IV federal financial aid. Its pronouncement is fatally conclusory and reflects no reasoning, valid or otherwise.

Where, as here, an agency's reasoning is "entirely conclusory," lacks valid reasoning by adding language that is not in the statute, and is inconsistent with its earlier pronouncement, it fails to meet *Skidmore*'s requirement of "thorough consideration." *Skidmore*, 323 U.S. at 140; *Sierra Club*, 929 F.3d at 693.

c. Even if the Eligibility Restriction were entitled to deference under *Chevron*, Congress's intent was clear

Congress did not delegate authority to the Department to interpret sections 18001-18007 of the CARES Act, making *Chevron* deference inappropriate. But even if it did, Congress's intent was clear— institutions of higher education are not restricted as to which students they may consider eligible for grants. This ends the analysis.

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When an agency has been delegated authority to interpret a statute, its implementation is analyzed using a two-step approach. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984). First, using the "traditional tools of statutory construction," the court first determines whether "the intent of Congress is clear[.]" *Id*. at 842 & n.9. The "traditional tools" include the statute's text, history, structure, "context"—including its place among other statutes enacted previously or "subsequently"—as well as "common sense." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-3 (2000). If Congress's intent is clear, "that is the end of the matter[.]" *Chevron*, 467 U.S. at 842–43. If not, and the statute "is silent or ambiguous with respect to the specific issue," the court determines "whether the agency's answer is based on a permissible construction of the statute." *Id*.

Here, Congress's intent with regard to student emergency grants when passing the CARES Act is clear: all students are eligible for aid if their school determines they have need. Starting with the text, Section 18004(c) is entitled "Uses of Funds." It directs that "[i]nstitutions of higher education shall use no less than 50 percent of such funds to provide emergency financial aid grants to *students* for expenses related to the disruption of campus operations due to coronavirus (including eligible expenses under a student's cost of attendance, such as food, housing, course materials, technology, health care, and child care)." CARES Act § 18004(c) (emphasis added). Similarly, section 18004(a) twice

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directs that the money should be given as "grants to *students* for any component of the student's cost of attendance . . . ." *Id*., §§ 18004(a)(2), (3) (emphasis added). Nothing in this language indicates Congress only intended *some* students to get aid, let alone that they intended to exclude some of the students with the greatest needs.

Nor did Congress choose to define "student" to only include those eligible for federal financial aid in the definitions section applicable to sections 18001-18006, where it would have if it so intended. CARES Act § 18007. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Here, the ordinary meaning of "student" is not restricted to those who meet the eligibility criteria for federal financial aid.

Further, there is no reference to the eligibility requirements in Title IV, section 484, of the HEA anywhere in sections 18001-18007. The only reference to Title IV is in section 18004(b), which states that "[t]he funds made available to each institution under subsection (a)(1) shall be distributed by the Secretary using the same *systems* as the Secretary otherwise distributes funding to each institution under title IV of the Higher Education Act of 1965 (20 U.S.C. § 1001 et seq.)." (Emphasis added.) The plain language of this provision indicates that

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the Secretary shall distribute money to the institution itself using the system it already has in place to transfer aid money to institutions. *See supra* at 4.

Title IV as a whole compels the conclusion that the term "system" is a technological system, not a methodology for determining eligibility. In addition to governing how federal financial aid is distributed, Title IV contains a nearly countless number of grants the Department distributes directly to institutions for a wide variety of purposes. 20 U.S.C. §§ 1051-1068h, 1101-1103g, 1121-1132, 1151-1155 (2020). In fact, the sections governing grants that go directly to institutions of higher education dwarf the number of provisions governing money that goes to students for federal financial aid. 20 U.S.C. §§ 1070-1099d (governing Student Assistance).

A myriad of eligibility requirements match the many provisions providing aid to students and institutions. *See* 20 U.S.C. §§ 1001 et. seq. For example, to be eligible under the Path to Success program, an individual must be aged 16-25, convicted of a criminal offense, and detained or released from a juvenile detention center. 20 U.S.C. § 1161w(f)(2) (2020). As another example, "eligible students" under the Pilot Programs to Increase College Persistence and Success must be at least 19 years old and a parent of at least one dependent child. 20 U.S.C. § 1161k (2020). None of these eligibility requirements—including eligibility for federally financial aid—can rationally be determined to be a "system" for distribution. *See* CARES Act § 18004(b).

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The structure of the CARES Act itself also shows that Congress did not intend to limit CARES Act emergency grants under section 18004 only to students eligible for federal financial aid. Among the many eligibility provisions available under Title IV, the Department selected a single eligibility provision and applied it to block needy students from accessing emergency grant money. Worse, the Department selected the eligibility provisions that apply to students applying for federal financial aid when Congress created a wholly separate section of the CARES Act that dealt with federal financial aid. CARES Act § 3513. It also defies credulity that Congress would intend to force an immensely burdensome administrative task—determining each individual student's technical eligibility for federal financial aid under Title IV—during a pandemic when school resources are extremely limited and time is of the essence for dispersing much-needed financial assistance. The Department's decision to add an additional eligibility requirement simply defies "common sense."

Thus when using the "traditional tools" of statutory construction such as the statutes text, structure, context, and common sense, *Brown & Williamson*, 529 U.S. at 132, Congress's intent is clear. Congress assigned to institutions the ability to determine the students who would receive CARES Act grants, subject "only [to the] statutory requirement … that the funds be used to cover expenses related to the disruption of campus operations due to coronavirus." Simpson Decl., Ex. B.

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2. The Department's Eligibility Restriction is arbitrary and capricious

The APA requires that a court "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A) (2020). Agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of a problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [made a decision that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "Unexplained inconsistency" between agency actions is also "a reason for holding an interpretation to be an arbitrary and capricious change . . . ." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

a. The Eligibility Restriction is an unexplained inconsistency

Unexplained inconsistencies are grounds to find a policy arbitrary and capricious, but a change in policy is permissible under the APA if the agency (1) displays "awareness that it *is* changing position," (2) shows that "the new policy is permissible under the statute," (3) "believes" the new policy is better, and (4) provides "good reasons" for the new policy. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). The Department failed to meet these standards.

As demonstrated above, the Department flip-flopped in just 11 days with no explanation. *See supra* at 7-10. The Department's policy reversal fails to meet the standards under *Fox*. First, the FAQs failed to mention the Department's previous position and failed to display any awareness that it was changing its position. Second, unlike the Secretary's Letter to Presidents and the Certification, which specifically referenced the statutory language of the CARES Act, the FAQs failed to refer to any portion of the CARES Act. Simpson Decl. Exs. B, C, G And, finally, because the FAQs did not acknowledge the Department's previous position entirely and included no analysis of the need for the change, it failed the third and fourth prongs of *Fox* by lacking a statement that the new policy is "better" and failing to provide "good reasons" for the change.

The Department's sudden policy shift is therefore arbitrary and capricious. *See Chinook Indian Nation v. U.S. Dep't of Interior*, No. C17-5668-RBL, 2020 WL 363410, at *7 (W.D. Wash. Jan. 22, 2020); *Washington v. U.S. Dep't of State*, 318 F. Supp. 3d 1247, 1260 (W.D. Wash. 2018).

b. The Eligibility Restriction fails to consider an important aspect of the problem

Moreover, the Eligibility Restriction "entirely fail[s] to consider an important aspect of the problem," which is that there are many students at Washington's institutions of higher education who do not qualify for financial aid under Title IV, section 484 of the HEA, but who need emergency financial assistance due to the impacts of COVID-19. In fact, many of the students who do

not qualify are those most in need of financial support. *See* Yoshiwara Decl. ¶¶ 18-19; Woods Decl. ¶¶ 18-24; Flores Decl. ¶¶ 15-22; Allison Decl. ¶¶ 16-23; Buchmann Decl. ¶¶ 15-27; *see also* Yoshiwara Decl. ¶ 19 (community colleges serve a large population of adult basic education students who are typically lower income and seeking to gain education and skills to improve their employment prospects); Flores Decl. ¶ 16 (same); Allison Decl. ¶ 17 (same); Yoshiwara Decl. ¶ 20 (community colleges serve significant number of Running Start students, many of whom are on free or reduced lunch programs); Flores Decl. ¶ 17 (same); Allison Decl. ¶ 18 (same).

And the decision to tie emergency grants to eligibility for federal financial aid ignores another important aspect of the problem: the Congressional purposes for each type of funding are different. Financial aid under Title IV of the HEA is comprised of Direct Loans, which must be repaid, and Pell Grants, which must be repaid under certain circumstances (*e.g.*, leaving the program, change in enrollment status, receiving other grants that reduce financial need). *See* 34 C.F.R. §§ 685.207, 690.80, 690.79 (2020). By contrast, when Congress passed the HEERF provisions, it did not envision students needing to repay the funds for any reason. *See* CARES Act § 18004. Thus, any reasons Congress may have conditioned eligibility for Federal Financial Aid under the HEA are simply absent under the CARES Act.

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c. The Department's Eligibility Restriction is so implausible it cannot be ascribed to a different in view or the product of agency expertise

Finally, the Department's decision to limit emergency grants only to students who are eligible for federal financial aid is completely implausible and unfounded in logic. As discussed above, there are myriad and diverse eligibility requirements found in Title IV's many provisions. The Department's decision to cherry-pick a single eligibility requirement from all of Title IV, in the absence of any direction from Congress to do so, runs so far counter to the language of the CARES Act that it is nonsensical and *prima facie* arbitrary and capricious. *See* 20 U.S.C. §§ 1161w, 1161k (2020).

3. The Eligibility Restriction violates Separation of Powers

In addition to violating numerous sections of the APA, the Department's Eligibility Restriction also violates constitutional separation of powers principles by permitting it to refuse to disburse money appropriated by Congress. The Constitution gives Congress, not the Executive branch, the power to spend and to set conditions on funds. U.S. Const. art. I, § 8, cl. 1. As shown above, Congress did not delegate to the Executive branch any power or authority to condition CARES Act grant dispersal on students' eligibility for federal financial aid under Title IV. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

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As the Ninth Circuit recently reaffirmed, the Executive Branch "does not have unilateral authority" to "thwart congressional will by canceling appropriations passed by Congress." *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1232 (9th Cir. 2018) (internal quotation marks and citations omitted); *see also Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("[N]o provision in the Constitution . . . authorizes the President to enact, to amend, or to repeal statutes."). To that end, the Executive Branch is without inherent power to "condition the payment of . . . federal funds on adherence to its political priorities." *Oregon v. Trump*, 406 F. Supp. 3d 940, 976 (D. Or. 2019) (citing *City of Chicago v. Sessions*, 888 F.3d 272, 295 (7th Cir. 2018), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated on other grounds*, No. 17-2991 & 18-2649, 2018 WL 4268814 (7th Cir. Aug. 10, 2018)).

If the Executive branch wishes to condition the receipt of federal funds, it may *only* do so pursuant to a specific delegation of spending authority by Congress. *City & Cty. of San Francisco*, 897 F.3d at 1233-34. Absent Congressional authorization, the Department "may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals." *Id.* at 1235. Moreover, the Executive cannot amend or cancel appropriations that Congress has duly enacted by imposing, without congressional authority, its own

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conditions on the receipt of such funds. *See Train v. City of New York*, 420 U.S. 35, 38, 44 (1975); *In re Aiken County*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013).

Nonetheless, this is what the Department has done by placing the Eligibility Restriction on CARES Act funds that Congress did not. Here, Congress did not afford the Department any discretion or authority to place such restrictions. Instead, as the Department initially recognized in its April 9, 2020, Secretary's letter to Presidents, the CARES Act did the opposite, giving institutions—*not* the Department—"significant discretion" to decide which students are in the greatest need of urgent financial help. CARES Act § 18004(c); Simpson Decl., Ex. B.[6] In unilaterally imposing the Eligibility Restriction, the Department abrogated the institutions' discretion and usurped Congress' power to legislate in violation of the principles of separation of powers.

4. The Eligibility Restriction violates the Spending Clause

The Spending Clause mandates that an agency must not impose conditions on federal funds that are (1) so coercive that they compel (rather than encourage) recipients to comply, (2) ambiguous, (3) retroactive, or (4) unrelated to the

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[6] In fact, the vast majority of the HEERF funds are allocated based on non-discretionary statutory formula. CARES Act § 18004(a)(1), (2). Formula grants in this vein "are not awarded at the discretion of a state or federal agency." *City of Los Angeles v. McLaughlin*, 865 F.2d 1084, 1088 (9th Cir. 1989). No discretion is given to determine student eligibility.

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federal interest in a particular program. *Nat'l Fed'n of Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519, 575–78 (2012); *South Dakota v. Dole*, 483 U.S. 203, 206-08 (1987).

First, the Department's Eligibility Restriction violates the prohibition on "ambiguity." "If Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The Eligibility Restriction is not stated "unambiguously" in the CARES Act. States "cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.' " *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst*, 451 U.S. at 17). Accordingly, Washington institutions did not know of the Eligibility Restriction at the time they signed the Department's certification to receive emergency financial aid grants for their students.

The Eligibility Restriction also violates the Spending Clause's prohibition on retroactive conditions. The Spending Power does not permit what the Department is attempting to do here: "surprising participating States with post acceptance or 'retroactive' conditions" on congressionally appropriated funds. *Pennhurst*, 451 U.S. at 25; *see also Sebelius*, 567 U.S. at 519 (quoting *Pennhurst*, holding Congress cannot retroactively alter conditions of Medicaid grants to states). Once a state or state entity has accepted funds pursuant to a federal spending program, the federal government cannot alter the conditions attached to

those funds so significantly as to "accomplish[] a shift in kind, not merely degree." *Sebelius*, 567 U.S. at 583. Nonetheless, the Department has improperly surprised Washington's colleges with post-acceptance conditions on funds by imposing the eligibility requirements *after* those colleges executed the required Certification. *Pennhurst*, 451 U.S. at 25. This is squarely prohibited under the Spending Clause.

Finally, the Eligibility Restriction violates the requirement under the Spending Clause that conditions be "reasonably related to the purpose of the expenditure[.]" *New York v. United States*, 505 U.S. 144, 172 (1992). The condition placed on a spending program must "share[] the same goal" as the program. *Charles v. Verhagen*, 348 F.3d 601, 609 (7th Cir. 2003). By contrast, the Department's Eligibility Restriction frustrates the goal of the CARES Act. Specifically, it is contrary to Congress's intent to provide financial assistance to students of higher education during a public health crisis.

C. Washington Will Suffer Irreparable Harm Absent Preliminary Relief

The harm analysis "focuses on irreparability, irrespective of the magnitude of the injury." *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (internal quotation marks omitted). Irreparable harm is harm "for which there is no adequate legal remedy, such as an award of damages." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). The testimony of multiple college and university administrators and financial aid officers establish that the

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Eligibility Restriction is likely to cause irreparable harm to Washington, its higher education institutions and their legislative mission, and its students.

1. Deprivation of State institutions' ability to use emergency funds for all needy students as granted by Congress

The Eligibility Restriction directly constrains the discretion Congress gave Washington's colleges and universities to distribute emergency financial aid grants to all needy students. In Section 18004(a)(1) of the CARES Act, Congress gave Washington higher education institutions their allocated share of the HEERF, and in section 18004(c) Congress told them they could use those funds for all "students for expenses related to the disruption of campus operations due to coronavirus . . . ." CARES Act § 18004(c). In the Eligibility Restriction, the Department excludes from this group of students a particularly needy population and cuts off the institutions' discretion.

This injury—denying the State use of emergency funds given it by Congress for the purposes specified by Congress—is irreparable. Needless to say, the country is in the midst of an unprecedented pandemic that has created extraordinary needs, and these are *emergency* funds urgently appropriated by Congress. The national unemployment rate is at the highest level since the Great Depression, denying working students their income. *See, e.g.*, Lucy Bayly, *Unemployment rate soars to 14.7 percent, highest level since the Great Depression*, NBC News (May 8, 2020, 7:51 AM PDT) https://www.nbcnews.com/business/economy/u-s-economy-shed-record-20-5-

million-jobs-last-n1202696 (last visited May 17, 2020). The sudden collapse of livelihoods is forcing Washington students to disenroll from colleges and universities. Flores Decl. ¶ 21; Woods Decl. ¶ 23; Buchmann Decl. ¶ 21; Allison Decl. ¶ 22; Yoshiwara Decl. ¶ 24; Sanchez Decl. ¶ 22. The Department's action denies disabled students the technology they need to continue their education, homeless students the campus facilities to maintain their hygiene, and low-income students food, health care, mental health treatment, and the technology necessary for online learning. Flores Decl. ¶ 15; Woods Decl. ¶ 17; Buchmann Decl. ¶ 15; Sanchez Decl. ¶¶ 16-17. These injuries are occurring now and cannot wait the year or more it would take to litigate this case to its conclusion. It is hard to imagine a stronger showing of irreparable injury. *See Brown v. Kramer*, 49 F. Supp. 359, 363 (M.D. Pa. 1943) (court takes judicial notice of state of national emergency that "render[s] irreparable the injury occasioned by violations of the Acts of Congress").

2. Uncompensable financial harm

The Eligibility Restriction irreparably harms Washington's proprietary interests. The Department's restriction has caused students to disenroll from Washington colleges and universities, and it will continue to do so absent court intervention. Flores Decl. ¶¶ 19, 21-22; Woods Decl. ¶ 23; Buchmann Decl. ¶ 21; Allison Decl. ¶ 22; Yoshiwara Decl. ¶ 24; Sanchez Decl. ¶ 22. Disenrollment results in a drop in tuition payments to the institutions, a source of their funding.

Flores Decl. ¶¶ 19, 21-22; Woods Decl. ¶¶ 23, 27; Buchmann Decl. ¶¶ 21-30; Yoshiwara Decl. ¶¶ 24, 28. No statutory provision exists that would enable Washington to recoup this lost tuition from the Department if it prevailed at the conclusion of this litigation. *See Azar*, 911 F.3d at 581 (States' uncompensable financial harm is irreparable); *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015) (same).

3. Undermining the mission of Washington's higher education institutions

The Washington legislature created the State's community colleges and four-year institutions to open the door to all Washingtonians, regardless of economic class, to the economic and personal benefits of higher education. Wash. Rev. Code §§ 28B.50.020(1), (3) (2019); Wash. Rev. Code § 28B.07.010 (2019). The Eligibility Restriction, by preventing colleges and universities from distributing CARES Act emergency grant to all needy students and precipitating students to disenroll, undermines this important mission. Flores Decl. ¶¶ 19, 21-22; Woods Decl. ¶¶ 23, 27; Buchmann Decl. ¶¶ 21-30; Yoshiwara Decl. ¶¶ 24, 28. Federal action that undermines a state program and impedes its purpose constitutes irreparable harm. *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016) ("An organization is harmed if the actions taken by [the defendant] have 'perceptibly impaired' the [organization's] programs.") (internal quotation marks and citations omitted); *see also Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994);

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Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1029 (9th Cir. 2013); *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1116 (N.D. Cal. 2018).

4. Destroying the health and well-being of Washington students

Thousands of Washington residents will be seriously harmed by the Final Rule. The Eligibility Restriction denies financial assistance to the most vulnerable students in Washington during an unprecedented time, forcing them to abandon their higher education and forego food, health care, and mental health counseling. *See, e.g.*, Flores Decl. ¶ 15; Woods Decl. ¶ 17; Buchmann Decl. ¶¶ 15, 21, 24-27; Soto Decl. ¶ 16; Allison Decl. ¶ 16; Sanchez Decl. ¶¶ 16-17; Cleary Decl. ¶ 13. This includes 24,364 Adult Basic Education students; 28,451 Running Start participants; upwards of 40,000 students who do not have an approved FAFSA; Dreamers; and those who do not meet the other eligibility requirements of Title IV of the HEA. Yoshiwara Decl. ¶¶ 13-14, 17. Injury to residents' health and well-being irreparably harms the State itself. *See Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 828 (E.D. Pa. 2019) ("the States also stand to suffer injury to their interest in protecting the safety and well-being of their citizens"); *California v. Health & Human Servs.*, 281 F. Supp. 3d 806, 830 (N.D. Cal. 2017), *aff'd in pertinent part sub nom. California v. Azar*, 911 F.3d 558 (9th Cir. 2018) (finding irreparable injury based in part on "what is at stake: the health of Plaintiffs' citizens and Plaintiffs' fiscal interests").

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5. Constitutional violations are irreparable harms

Finally, the constitutional violations caused by the Eligibility Restriction establish irreparable harm. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.' ") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

D. Equity and Public Interest Strongly Favor an Injunction

When the government is a party, the final two *Winter* factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). "The purpose of such interim equitable relief is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (internal citations omitted). The principal consideration concerns the extent of the "public consequences" attendant to the stay of the Rule. *Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 32 (D.D.C. 2018) (quoting *Winter*, 555 U.S. at 24); *see also Hernandez*, 872 F.3d at 996. Here, the balance of the equities and public interest strongly favor a stay.

"There is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters*, 838 F.3d at 12 (internal quotation marks and citations omitted). The Eligibility Restriction violates the APA, and has

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significant, and immediate, consequences to Washington's students and institutions of higher education. It is, without doubt, in the public interest to ensure that all students who are struggling with the financial fall-out of COVID-19 have access the emergency funding appropriated by Congress.

By contrast, preserving the status quo will not harm the defendants, and refraining from enforcing the eligibility requirement will cost them nothing. *See Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011) (court may waive Rule 65(c) bond requirement). Indeed, Washington merely seeks to keep in place the Department's initial interpretation and guidance they issued when they first made the funding available to institutions. Thus, the final two *Winter* factors weigh heavily in favor of the interim equitable relief sought by the Plaintiff States.

IV. CONCLUSION

For the foregoing reasons, the State of Washington requests that the Court preliminarily enjoin Defendants from implementing or enforcing the Eligibility Restriction.

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RESPECTFULLY SUBMITTED this 19th day of May 2020.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be served via U.S. Certified Mail as follows:

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